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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CLAUDE E. ATKINS
ENTERPRISES, INC., et al.,

Plaintiffs and Respondents,

v.

CAL-STATE DEVELOPMENT &
ELECTRICAL CONSTRUCTION
CORP., et al.,

Defendants and Appellants.

B193110

(Los Angeles County
Super. Ct. No. PC038588)

APPEAL from an order of the Superior Court of Los Angeles County,
Melvin D. Sandvig, Judge. Affirmed.

Steven R. Lovett for Defendants and Appellants.

Braun & Melucci and Kerri M. Melucci for Plaintiffs and Respondents.

Defendants and appellants Cal-State Development & Electrical Construction Corp. (Cal-State Development) and its president, Isaac Brook (Brook), appeal an order denying their special motion to strike a complaint for malicious prosecution filed by plaintiffs and respondents Claude E. Atkins Enterprises, Inc., a California corporation (Atkins), and its attorneys, Braun & Melucci LLP, a California limited liability partnership (B&M). (Code Civ. Proc., § 425.16.)¹

The essential issue presented is whether Cal-State Development and Brook lacked probable cause to bring the underlying action against Atkins and B&M.

We conclude the underlying action by Cal-State Development and Brook was not supported by probable cause. Therefore, the trial court properly denied Cal-State Development and Brook's special motion to strike the malicious prosecution complaint. The order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The initial action: Atkins sued Cal-State Electric for breach of a subcontract; Cal-State Electric did not defend the action, resulting in a judgment for Atkins in the sum of \$871,924.*

On November 6, 2001, Atkins filed suit against Cal-State Electric for breach of a subcontract with Atkins to perform electrical work on a federal work of public improvement at the VA Medical Center in Sepulveda, California. Prior to trial, Cal-State Electric's president, Brook, incorporated a new California corporation, Cal-State Development. Two days before trial, Cal-State Electric filed for bankruptcy, resulting in a stay of that action. While the bankruptcy petition was pending, Cal-State Electric closed its business and Brook transferred all of its ongoing subcontracts to Cal-State Development which completed the projects and collected thereon.

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

The bankruptcy case was dismissed for Cal-State Electric's failure to file certain required schedules in the bankruptcy court. Thereafter, the Atkins action against Cal-State Electric was re-set for trial on April 26, 2004. Cal-State Electric did not appear at trial to defend the action. On April 30, 2004, the trial court entered a default judgment against Cal-State Electric in the sum of \$871,924.

2. Cal-State Development sued Atkins and its attorneys for libel and interference with economic advantage after they tried to collect the judgment; the trial court entered judgment for Atkins and its counsel, finding the letters sent by counsel in an attempt to recover on the judgment were privileged and that the statements in the letters were true.

On June 10, 2004, the trial court issued a writ of execution and the sheriff's department issued and served a notice of judgment lien upon the contractors with which Cal-State Electric had subcontracts, including Peck Jones Construction, KPRS Construction and Kajima Construction & Engineering Services. Acting on behalf of Atkins, his client, attorney William Braun (Braun) of B&M sent letters to these contractors seeking to recover on the judgment. In one example of the letters, Braun made reference to the writ of execution and notice of judgment lien served upon KPRS by the sheriff's department and stated: "These documents require KPRS Construction to tender possession of all funds due and payable to Judgment Debtor Cal-State Electric . . . to the Los Angeles County Sheriff's Department." Braun cited the requirements of Code of Civil Procedure section 701.010 for KPRS Construction to tender funds to the sheriff's department, and also cited to the Uniform Fraudulent Transfer Act, Civil Code section 3439.04.

Braun's letter also made various factual representations concerning Cal-State Electric, Cal-State Development and Brook. The letter stated Brook was the alter ego of Cal-State Electric and Cal-State Development and that Brook personally embarked on a plan to evade the Atkins judgment; Cal-State Electric and Cal-State Development were alter egos; and the transfer of the ongoing construction projects from Cal-State Electric to Cal-State Development was a fraudulent transfer designed to defraud Atkins.

On July 26, 2004, Cal-State Development, represented by attorney Mark Brifman (Brifman), filed suit against Atkins and the B&M law firm, pleading causes of action for libel and intentional interference with economic advantage (interference), alleging the letters were libelous and caused customers of Cal-State Development to falsely conclude it could not complete current or future work. Atkins and B&M filed an answer, asserting the letters were absolutely privileged under the litigation privilege (Civ. Code, § 47, subd. (b)(2)) and thus were not actionable.

The trial court ordered bifurcation of the affirmative defense of application of the litigation privilege to the letters. In that proceeding, the trial court heard evidence, inter alia, on the truth or falsity of statements made in the letters. Thereafter, the trial court ruled the bifurcated issues were dispositive and that defendants Atkins and B&M were entitled to judgment.

In an extensive statement of decision, the trial court (Judge Schwab) ruled the “letters written by Attorney Braun on behalf of ATKINS were absolutely privileged and no cause of action could be brought thereon. In addition, the factual statements in the letters were true and cannot support a cause of action for libel or [interference].”

3. *The instant action: Atkins and B&M sue Cal-State Development, Brook and Brifman for malicious prosecution*

a. *Pleadings.*

On April 13, 2006, Atkins and B&M filed the instant action against Cal-State Development, Brook and Brifman, alleging malicious prosecution of the underlying action for libel and interference. The complaint alleged, inter alia: Atkins and B&M had obtained a favorable termination of the underlying action; Brifman lacked probable cause to file the underlying action because a reasonable attorney would have concluded an attempt to collect upon a valid judgment is an extension of the judicial process and that the letters were covered by the litigation privilege; and the action was brought with malice, for the purpose of preventing Atkins from collecting upon a valid judgment.

In addition to the malicious prosecution claim, the complaint contained a cause of

action against Brifman for negligence (second cause of action). In that regard, the complaint alleged Brifman owed a duty not to file an action which is frivolous, motivated by bad faith or solely intended to cause unnecessary delay and that he breached that duty to Atkins and B&M by filing the complaint in the underlying action.

The complaint also contained a third cause of action, seeking enforcement of the judgment against Cal-State Development and Brook.

b. *The special motion to strike.*

On June 7, 2006, Cal-State Development, Brook and Brifman filed a special motion to strike, contending that as a matter of law, the first and second causes of action were based on defendants' exercise of their constitutional rights and Atkins and B&M could not demonstrate a probability of success on those causes of action.

With respect to the malicious prosecution claim, the moving papers contended Atkins and B&M could not establish defendants lacked probable cause to bring the action for libel and interference. In support, the moving papers relied on a ruling by the trial court in the prior case denying a special motion to strike brought by Atkins and B&M. The moving papers asserted the denial of that earlier motion established, as a matter of law, that the libel and interference claims were supported by probable cause.

As for the second cause of action, sounding in negligence, the moving papers contended adverse counsel does not owe a duty of care to an opposing party, and therefore Atkins and B&M could not prevail on their negligence claim against Brifman.

c. *Opposition papers.*

In opposition, Atkins and B&M contended the ruling on the anti-SLAPP motion in the prior action was inadmissible and could not be used by the moving parties to establish probable cause to bring the underlying action.²

² Section 425.16 provides in relevant part at subdivision (b)(3): "If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, *neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action . . .*" (Italics added.)

In addition, the opposing papers argued Atkins and B&M could establish facts sufficient to establish a prima facie case which, if believed by the trier of fact, would result in a judgment in their favor.

d. *Trial court's ruling.*

On July 6, 2006, the matter came on for hearing. The trial court granted the special motion to strike as to Brifman as to the first and second causes of action and denied the special motion to strike as to Cal-State Development and Brook.

On August 4, 2006, Cal-State Development and Brook filed notice of appeal from the order denying their special motion to strike.³

CONTENTIONS

Defendants contend: the trial court was required to state its rationale for denying their special motion to strike; and whatever rationale the trial court employed to grant the special motion to strike as to defendant Brifman should also have been employed as to Cal-State Development and Brook because the same set of operative facts applied to all the defendants.

DISCUSSION

1. *General principles related to a special motion to strike.*

“A SLAPP suit – a strategic lawsuit against public participation – seeks to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted . . . section 425.16 – known as the anti-SLAPP statute – to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) The purpose of the statute is to encourage continued participation in matters of public significance by preventing abuse of the judicial process. (§ 425.16, subd. (a).) The statute is to “be construed broadly.” (§ 425.16, subd. (a).)

³ The order is appealable. (Code Civ. Proc., § 425.16, subd. (i).)

Analysis of a section 425.16 motion requires a two-step process. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) In the first step, the trial court determines whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) If the trial court finds the defendant has made the required showing, it determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*)

“Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider ‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’ (§ 425.16, subd. (b)(2).) However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

Guided by these principles, we turn to the issues presented herein.

2. *No merit to appellants’ contention the trial court erred in failing to set forth its rationale for denying the special motion to strike as to Cal-State Development and Brook.*

Cal-State Development and Brook contend it was error for the trial court to grant the special motion to strike as to Brifman while denying it as to Cal-State Development and Brook without explanation or rationale.

The contention is unavailing. Cal-State Development and Brook do not cite any authority requiring the trial court to articulate its reasons for denying a special motion to strike under section 425.16. (Compare § 437c, subd. (g) [in denying a motion for summary judgment the trial court must specify one or more material facts as to which a triable issue exists].)

Further, a statement of decision pursuant to section 632 may be had “upon the trial of a question of *fact* by the court” and shall be issued upon the *request* of a party appearing at the trial. (*Ibid.*, italics added.) The issues on a special motion to strike are

legal, not factual. Further, there is no showing that a statement of decision was requested. For all these reasons, appellants' contention in this regard is meritless.

3. *Trial court properly denied special motion to strike as to defendants Cal-State Development and Brook.*

a. *Reliance by Cal-State Development and Brook on favorable ruling obtained by Brifman is misplaced.*

Cal-State Development and Brook contend that whatever rationale the trial court used to grant the special motion to strike as to defendant Brifman should also have been employed as to them because the same set of operative facts applied to all three defendants. The argument is unavailing.

Cal-State Development and Brook do not cite any authority for the proposition that the grant of a special motion to strike in favor of one defendant entitles codefendants to the same disposition. Further, we are not concerned with the grant of the special motion to strike as to Brifman. Irrespective of whether that ruling is correct, Atkins and B&M did not file a cross-appeal to obtain review of that ruling. Our review is limited to the merits of the denial of the special motion to strike as to defendants Cal-State Development and Brook.

b. *Trial court correctly denied special motion to strike as to Cal-State Development and Brook.*

(i) *Cal-State Development and Brook met their burden to show the challenged cause of action against them arose from their protected activity.*

It was the initial burden of Cal-State Development and Brook to make a threshold showing that the challenged cause of action against them for malicious prosecution arose from their protected activity. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1056.) Cal-State Development and Brook met that burden. It is established that a cause of action for malicious prosecution is subject to anti-SLAPP scrutiny. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741.)

In the language of the anti-SLAPP statute, a cause of action against a person arising from any act of that person *in furtherance of the person's right of petition* or free speech under the United States or California Constitution in connection with a public issue is subject to a special motion to strike. (§ 425.16, subd. (b)(1).)⁴

Here, Cal-State Development and Brook were sued for malicious prosecution, for having filed a lawsuit against Atkins and B&M for libel and interference. In other words, Cal-State Development and Brook were sued for protected activity, for having exercised their right to petition the judicial branch.

Consequently, the burden shifted to Atkins and B&M to demonstrate a probability of prevailing on their malicious prosecution claim. (§ 425.16, subd. (b)(1); *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056.)

(ii) *Atkins and B&M met their burden to establish a probability of prevailing on their malicious prosecution claim against Cal-State Development and Brook.*

In order “to establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate ‘that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff’s, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].’ ” (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel*).)

With respect to the first element of the tort of malicious prosecution, Atkins and B&M showed the prior action against them for libel and interference terminated with a judgment in their favor.

⁴ Section 425.16 provides in relevant part at subdivision (e): “As used in this section, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) *any written or oral statement or writing made before a . . . judicial proceeding . . .*; (2) *any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . .*” (Italics added.)

With respect to second element, whether the defendant had probable cause for instituting the prior action “has traditionally been viewed as a question of law to be determined by the court” (*Sheldon Appel, supra*, 47 Cal.3d at p. 875.)

Determination of the presence or absence of probable cause depends on the “facts which the defendant knew when he instituted the prior action” (*Id.* at p. 884.)

Here, Atkins and B&M showed Cal-State Development and Brook lacked probable cause to sue Atkins and B&M for libel and interference for their collection efforts against Cal-State Development because Brook essentially admitted that Cal-State Electric and Cal-State Development were alter egos of each other. On December 31, 2003, about seven months before filing suit against Atkins and B&M for libel and interference, Brook signed a subcontractor change order with a contractor, KPRS, “to reflect company name change.” The zero cost change order substituted Cal-State Development in place of Cal-State Electric as the subcontractor on the contract, and as Judge Schwab found, was part of a plan by Brook to evade the judgment. In sum, given the facts known to Brook and Cal-State Development at the time they filed the prior action, their lawsuit against Atkins and B&M for their collection efforts against Cal-State Development was not supported by probable cause.⁵

Finally, the third element of the tort, malice, may be inferred when the proceedings are instituted primarily for an improper purpose. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 633.) Here, Atkins and B&M presented evidence that the action for libel and interference was brought for the purpose of hindering Atkins’s ability to collect upon the \$871,924 judgment against Cal-State Electric.

⁵ Cal-State Development and Brook have asserted the trial court’s denial of a special motion to strike by Atkins and B&M in the previous action establishes that Cal-State Development and Brook had probable cause to file suit for libel and interference. The argument is meritless. As indicated in footnote 2, *ante*, the trial court’s ruling on an anti-SLAPP motion is inadmissible in a later stage of that action or in any subsequent proceeding. (§ 425.16, subd. (b)(3).) Therefore, the trial court’s ruling on the anti-SLAPP motion in the previous action is of no import.

Accordingly, Atkins and B&M met their burden to show a reasonable probability they will prevail on their malicious prosecution claim against Cal-State Development and Brook. Therefore, the trial court properly denied the special motion to strike brought by Cal-State Development and Brook.

DISPOSITION

The order denying the special motion to strike as to Cal-State Development and Brook is affirmed. Respondents shall recover their costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.